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JOHN T. FEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 11

UNITED STATES GYPSUM COMPANY,
Appellant,

vs.

NATIONAL GYPSUM COMPANY, ET AL.,
Appellees.

BRIEF IN OPPOSITION TO MOTION FOR THE RE-TAXING OF COSTS.

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Appellant, United States Gypsum Company (Gypsum), opposes the motion of appellee, National Gypsum Company (National), to re-tax the costs of appeal in this action.

A. The Costs Were Properly Taxed.

For at least a century, it has been the practice of this Court, when reversing a judgment in some major part, to charge costs only to the appellee or respondent. See *Baldwin* v. *Ely*, 9 How. 580, 602 (1850). Even where a judgment of the Court, reversing in part and affirming in part, lacks express provision for costs (unlike the instant judgment*), the Court has sanctioned a usage of the Clerk,

* The judgment of the Court in this action directed:

"* * * that the judgment of the said United States District Court in this cause be, and the same is hereby, reversed with

placing the costs upon the appellee or respondent. In point is *St. Louis & S. F. R. Co.* v. *Spiller,* 275 U. S. 156 (1927), where the Court unanimously denied a motion to re-tax costs, based, *inter alia,* on the ground that equity required, on a reversal in part and affirmance in part, a division of costs. Justice Brandeis, writing for the Court, observed:

> "* * * At no time has the rule expressly prescribed whether costs shall be allowed when the judgment or decree below is reversed only in part. But it has long been the practice of the Clerk to insert in the mandate, in such cases, the provision for payment of costs by the defendant in error, appellee or respondent, in the absence of specific direction by the Court. The acquiescence of the Court in this practice has operated to give effect to it as a practical construction of the rule." (275 U. S. at 160.)

The rule of the Court applied in the *Spiller* case** is in substance the same as present Rule 57(2) of the Court, the rule under which the costs of this appeal were assessed. The practice approved in the *Spiller* case, of placing costs, on a reversal in part, upon the appellee, continues to be honored by the Court. See *Calmar S. S. Corporation* v. *Taylor,* 303 U. S. 525 (1938), and on motion to retax costs, 59 Sup. Ct. 56 [Not officially reported]. Cf. *Electrical Fittings Corp.* v. *Thomas & Betts Co.,* 307 U. S. 241 (1939),

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costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Columbia for further proceedings not inconsistent with the opinion of this Court.

"It is further ordered that the said appellant, United States Gypsum Company, recover from the National Gypsum Company et al. Seven Thousand Twenty Dollars and Eighty Cents ($7,020.80) for its costs herein expended and have execution therefor.

Per Mr. Justice Harlan
February 25, 1957"

** Rule 29(3) of the Revised Rules, adopted June 8, 1925 (266 U.S. 675).

and on motion to retax costs, 59 Sup. Ct. 1040 [Not officially reported].

B. The Costs Should Be Borne by Appellees.

The thrust of the Gypsum appeal to this Court can be simply put. It was a claim that the 1951 decision and final decree of the court below did not, *per se,* bar prosecution of the four Gypsum compensation and damage suits. Appeal was necessary because the district court had held, upon a record closed in 1941, that Gypsum could be barred from claiming for use of its patents through the years 1948 to 1951. As this Court pointed out in its opinion (352 U. S. at 466), the decision below held Gypsum barred, first, by reason of a so-called "fresh" patent misuse, a misuse unrelated to the original antitrust litigation; secondly, because the "old" misuse adjudicated in the Government antitrust proceeding remained unpurged; and finally, because the "old" misuse itself was deemed sufficient to bar suit for patent infringement, irrespective of purge. Each of those grounds this Court rejected.

Now, using a novel pica-gauge theory of jurisprudence [Motion, p. 2 fn.], National urges that appellees fought Gypsum to a draw on the appeal and that costs should be taxed accordingly.

Rule 57 of this Court serves a practical purpose. By setting up workable criteria for ascribing costs, it permits allocation of that function to the office of the Clerk, sparing this Court the need to practice, at the end of each decision, some vague calculus to fix provision for costs. Recognition of this purpose is immanent in the decision in *Spiller, supra.* It seems particularly important, where the party charged with the costs, as here, can bear them

without distress, that tampering with the mechanics of Rule 57 be avoided. Unless this Court would invite applications to retax, it should deny this motion.

Respectfully submitted,

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May 14, 1957.